FRONT Report LINE

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Legislators make numerous changes to criminal law

The General Assembly this year made several changes to Missouri's criminal laws, all of which have taken effect. Among the changes:

- Allows for lifetime supervision of certain repeat sex offenders (HB 353 — Section 217.735).
- Removes mandate that photos or copies of items seized pursuant to a search warrant be filed with the court (HB 353 — Section 542.276).
- Allows agencies to hold an arrestee for 24 hours before filing charges (HB 353 — Section 544.170).
- Expands endangering the welfare of a child where meth is manufactured

SEE CRIMINAL LAW, Page 2

Police not civilly liable for failing to enforce restraining orders

Castle Rock, Colorado v. Gonzales
No. 04-278
June 27, 2005

The U.S. Supreme Court ruled that a police department is not guilty of violating a woman's due process rights by failing to enforce a restraining order.

The woman filing the initial lawsuit claimed that the police had

SEE RESTRAINING ORDERS, Page 2

Flanked by officers from several St. Louis and St. Charles County police departments, Attorney General Nixon announces a crackdown on "badge fraud."

"Badge fraud" operation shut down

Attorney General Jay Nixon cracked down on "badge fraud" by suing a father and son who were soliciting donations from St. Louis-area businesses by misrepresenting that the telemarketers were police officers.

Nixon obtained a temporary restraining order in St. Charles County Circuit Court against Gerald J. Lami, O'Fallon, and his son, Jay Lami, Beaufort.

Gerald Lami does business as Police Tribune, Jay Lami as Safety Promotions. The order freezes the Safety Promotions account of Jay Lami.

Business owners were solicited to buy advertising in the Police Tribune or make other charitable donations, purportedly to benefit law enforcement-related programs and organizations.

Neither Police Tribune nor Safety Promotions is registered as a professional fundraiser or a charitable organization with the AG's Office, as required by law.

Besides freezing the fundraising accounts of the defendants, the TRO prohibits the Lamis or their representatives from further violations of Missouri consumer protection laws.

Nixon is asking for preliminary and permanent injunctions, and is seeking consumer restitution and penalties.

Nixon greets St. Peters Police Chief Tom Bishop. His department was one of several working with Nixon on badge fraud complaints.

CRIMINAL LAW: CONTINUED FROM PAGE 1

in a residence where a child lives, even if that child is not present at the time (HB 353 — 568.045).

- Restricts the sale of certain types of pseudoephedrine to sales by a pharmacist or pharmacist-technician and requires that pharmacists maintain certain records of those sales (HB 441—Section 195.017).
- Allows counties to maintain a Web page that lists registered sex offenders (SB 73 — Section 589.402).
- Expands the crime of involuntary manslaughter to include various situations where the driver is intoxicated and causes the death of another (HB 972 — Section 565.024).
- Creates the terms "aggravated offender" and "chronic offender" and enhances penalties, including minimum jail time, for those repeat offenders (HB 972 — Section 577.023).
- Removes previous requirement that a "persistent offender" have committed two or more previous offenses within a 10-year period (HB 972 — Section 577.023).
- Creates a crime of a minor in possession by consumption and provides for license suspension for minors in violation (SB 402 — Section 311.325).

Review new bills on Web

- Senate bills: www.senate.mo.gov
- House bills: www.house.mo.gov

SESSION UPDATE

Legislators amended parts of HB 972 in a special session in September. To review those changes, review HB 2 which made cleanup changes to ensure that changes made in various bills from the regular session were consistent.

RESTRAINING ORDERS: CONTINUED FROM PAGE 1

violated her civil rights by failing to respond to her repeated reports of her children's abduction: A restraining order had been issued by a local court.

Her estranged husband took their three children on a non-visitation date and murdered them.

The husband was given specific visitation rights under Missouri's equivalent to a full order of protection. Police told the mother to "wait and see" if he returned the children.

Like Missouri, Colorado law requires a police officer to arrest an offender who violates a restraining order. The court concluded, however, that this did not create a "property interest" in having the police enforce the restraining order.

In other words, the court concluded that failure to enforce the order did not make the officers guilty of a civil rights violation because the constitution "did not create a system by which police departments are generally held financially accountable for crimes that better policing may have prevented."

Court reverses abandonment conviction: Defendant "left" corpse

State v. William Jones Jr.
No. 63842
Mo.App., W.D.
Aug. 16, 2005

The court reversed the defendant's conviction of the Class D felony of abandoning a corpse, Section 194.425.1, RSMo 2000.

The defendant argued that although the state had the option of prosecuting him for having abandoned, disposed, deserted or left the corpse, the state chose to argue and instruct only that he "left" the corpse without reporting its location to law enforcement when he drove off after walking up to the body, kicking a shoe, seeing dried blood on the head, and realizing he was dead.

As used in Section 194.425.1, "leaves" should be construed to mean "put[s], place[s], deposit[s], or deliver[s] before or in the process of departing or withdrawing" or "cause[s] to be ... in some specified condition," rather than "permit[s] to remain undisturbed or in the same position."

Such a construction is consistent with the Missouri Supreme Court's observations in *State v. Bratina*, 73 S.W.3d 625 (Mo. banc 2002), where the court strongly implied that to "leave" a corpse in the latter sense does not involve a sufficient "relationship or duty with respect to the dead body" for that conduct to be prohibited by Section 194.425.1, while to "leave" a corpse in the former sense does.

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UPDATE: CASE LAW

Opinions can be found at www.findlaw.com/casecode/index.html

MISSOURI SUPREME COURT

DEATH PENALTY

State v. Mark Anthony Gill
No. 85955, Mo. banc, July 12, 2005

The trial court did not err in submitting the verdict-directing instructions for first- and second-degree murder, based on accomplice liability in the disjunctive. Notes on Use 5(c) to MAICR3d 304.04 instruct the court to ascribe the conduct elements to the defendant or the other person when the evidence is unclear or conflicts as to whether the defendant or another person engaged in the conduct constituting the offense.

Under the circumstances, including the defendant's several inconsistent statements and statements inconsistent with physical evidence, the evidence was unclear as to whether he or his accomplice was the shooter. The defendant's argument that the prosecutor's use of a hypothetical during jury selection misled and misinformed the jurors has no merit: the hypothetical conformed to the basic concept of accomplice liability.

The prosecutor properly emphasized that the hypothetical was an example and the judge would give the jury the exact law during instructions.

The defendant was precluded from challenging the trial court's refusal to strike a prospective juror for cause because the juror did not sit on the jury or participate in the verdict. The statute precluding such a challenge, Section 494.480.4, RSMo 2000, is not unconstitutional. The only constitutional requirement is that the jury must be made up of qualified and impartial jurors.

EASTERN DISTRICT

JURORS, DWI-SENTENCING ENHANCEMENT

State v. Tommy Gene Rosse
No. 85092, Mo.App., E.D., Aug. 9, 2005

In the defendant's DWI prosecution, the trial court did not abuse its discretion when it refused to remove a juror who taught a witness 17 years prior to trial. The juror testified that she had no social relationship with the witness and that knowing him would not affect her ability to be a fair and impartial juror.

There was an insufficient basis to sentence the defendant as a persistent offender. The state failed to meet its burden of proving that the defendant had pleaded to or been found guilty of two or more intoxication-related offenses as required by Section 577.023.

Even if the defendant's testimony was sufficient to establish he pleaded to or was found guilty of an intoxication-related traffic offense in 1996, a persistent offender is one who has two prior intoxication-related traffic offenses, both of which occurred within 10 years of the offense charged.

The case was remanded to trial court for jury sentencing in accordance with Section 557.036.

DELIBERATION, UNBORN CHILD

Willis Bailey v. State
No. 84855, Mo.App., E.D., July 12, 2005

There was a factual basis to support the defendant's guilty pleas to first-degree murder of a pregnant woman and her unborn child. An unborn child is a person for purposes of first-degree murder, and the defendant's intent to kill a woman he knew was pregnant included deliberation on and intent to kill the unborn child.

Moreover, the defendant could not establish prejudice resulting from his guilty pleas on the other counts since he was sentenced to life imprisonment without probation or parole on the count relating to the woman's murder, which he did not challenge.

KIDNAPPING, INTERFERENCE

Steven M. Spier v. State
No. 85136, Mo.App., E.D. July 19, 2005

The court reversed the denial of the defendant's Rule 24.035 motion and ordered that his kidnapping conviction following a guilty plea be vacated.

His guilty plea to kidnapping was predicated on information that failed to state the essential elements of the offense. Removal of a child from "court ordered care, custody and control," as charged in this case, does not constitute "interference with the performance of any governmental or political function."

The comments to the model penal code indicate that interference with political and governmental functions reaches situations of political terrorism and the like, such as the abduction of witnesses, candidates, party leaders, officials and voters. Here, the removal of the children from "court ordered care, custody and control" was not an act of political terrorism or the like.

UNCHARGED CONDUCT, TOTAL PICTURE

State v. George Estes
No. 84950, Mo.App., E.D., June 30, 2005

In a prosecution for possession of a controlled substance with the intent to sell, evidence of a controlled drug buy presented a complete picture of the events surrounding the search that led to the charged offense. There was no manifest from the admission of such uncharged evidence.

RAPE SHIELD, APPLICATION

State v. Ronnie Reeder
No. 84507, Mo.App., E.D., June 28, 2005

In a prosecution for first-degree statutory rape and one count of attempted child molestation, the court did not err in restricting the defendant's use of the victims' prior false allegations.

The new rule, established in *State v. Long,* 140 S.W.3d 27 (Mo. banc 2004) and decided while this case was pending on appeal, governs the admissibility of evidence is procedural, and therefore applies prospectively only.

UPDATE: CASE LAW

WESTERN DISTRICT

HEARSAY, PLAIN ERROR REVIEW

State v. Jason Norman

No. 64073, Mo.App., W.D., Aug. 16, 2005

The court affirmed the defendant's convictions of trafficking drugs in the first degree and second degree.

There was no plain error when admitting testimony that the owner of the residence where meth was found had mentioned the defendant's name since there was substantial and properly admitted corroborating evidence linking the defendant to the meth.

Even if the testimony was inadmissible hearsay under the co-conspirator exception on the basis that the conspiracy had ended, the defendant's fingerprint was found on a jar containing meth, there was testimony that a bag found in her house belonged to defendant, and the defendant had been heard discussing meth in the residence. The defendant admitted to having committed the crimes while in custody.

The trial court did not err in submitting both count I and count II on trafficking drugs in the first degree and second degree to the jury and sentencing defendant on both counts.

SELF-DEFENSE, INSTRUCTIONS

State v. Patrick L. Beck

No. 63708, Mo.App., W.D., July 26, 2005

The defendant was charged with first-degree assault for seriously injuring the victim with a knife. He was convicted of the lesser-included offense of second-degree assault after claiming self-defense: He was justified in stabbing the victim, who held him while two of the victim's friends approached brandishing a baseball bat and metal pipe.

The court reversed, finding instructional error in the self-defense instruction. The court found no plain error in the use of the "imminent danger of harm" language in the self-defense instruction, patterned after MAI-CR 3d 306.06.

It opined that MAI-CR 3d 306.06 is not a correct statement of the law of self-defense, to the extent it requires the jury to deliberate on whether the defendant acted justifiably in using force because he had a reasonable belief that he was in "imminent danger of harm," rather than he had a reasonable belief the other person was using or was about to use "unlawful force."

It was not readily apparent that instructing the jury — to deliberate on whether the defendant had a reasonable belief that he was in "imminent danger of harm," rather than whether he had a reasonable belief as to the "use or imminent use of unlawful force" — so confused the jury that it did not properly consider the claim of self-defense.

The court found instructional error by failing to instruct the jury that it could consider not only the victim's actions, but the victim's friends, in determining whether he acted in lawful self-defense.

The closing argument, coupled with instruction, would have undoubtedly led the jury to believe, contrary to the law, that it could not consider the acts of the victim's friends.

On remand, the defendant could be retried for second-degree assault, but not first-degree assault since he was acquitted of that offense when the jury found him guilty of the lesser-included offense of second-degree assault.

TRAFFIC STOPS, DETENTION PERIOD

State v. Oscar Barreras Sanchez

No. 63807, Mo.App., W.D., July 26, 2005

The court reversed the defendant's conviction of first-degree trafficking. The trial court erred in denying a motion to suppress during a search of a vehicle in which the defendant was riding because the detention extended beyond the time reasonably necessary to effect the purpose of the initial traffic stop and there was no new reasonable suspicion that would support further detention.

CRIMINAL NONSUPPORT, ADEQUATE SUPPORT

State v. Bradley J. Link Sr.

No. 63658, Mo.App., W.D., July 26, 2005

There was sufficient evidence to convict the defendant of felony criminal nonsupport. The state proved beyond a reasonable doubt that the defendant failed to provide "adequate support" for his child as defined by Section 568.040: The defendant failed to provide support he was legally obligated to provide in each of six months within a year.

CONSTRUCTIVE POSSESSION

State v. Anthony D. Driskell

No. 63742, Mo.App., W.D., July 19, 2005

The court reversed the defendant's conviction of possession of a controlled substance, stating the state failed to prove he had knowledgeable possession of drugs found hidden in his car's console. Because a co-owner and passenger had access to the console, more evidence was required to show the defendant was aware of the drugs and thereby had constructive possession.

SENTENCING

State v. William Weaver

No. 63529, Mo.App., W.D., July 12, 2005

The trial court erred in sentencing the defendant although he had not requested in writing, prior to voir dire, that the court assess punishment. However, no manifest injustice occurred because the defendant had on many times expressed a desire to be sentenced by the court and did not object to the court assessing punishment.

BUSINESS RECORDS, FINGERPRINTS

State v. James Joe Carruth

No. 64067, Mo.App., W.D., July 5, 2005

The court did not err in relying on the evidence to determine defendant's prior offender status. The fingerprint evidence was properly admitted as a business record based on testimony of a Highway Patrol lab tech about how the fingerprints were taken, processed and maintained in the regular course of business.

UPDATE: CASE LAW

WESTERN DISTRICT

ACCOMPLICE LIABILITY

State v. Donald L. Biggs Sr.
No. 63312, Mo.App., W.D., June 21, 2005

Evidence showed that the defendant associated himself with an armed robbery for which he was charged, and provided conduct for its completion. The court determined the trial court did not commit plain error in giving the verdict directing instruction, which contained the phrase "acted together with or aided."

The trial court did not commit plain error in failing to declare a mistrial or instruct the jury to disregard the prosecutor's closing argument. It addressed a witness's credibility and motive for testifying, highlighted the seriousness of the offense and the defendant's disregard for the law, and was not reasonably interpreted as a comment critical of his exercise of his rights.

SECOND-DEGREE ROBBERY, STEALING

State v. James E. Lybarger
No. 62887, Mo.App., W.D., June 14, 2005

There was sufficient evidence to support the defendant's second-degree robbery convictions. The evidence was sufficient to prove forcible stealing because the defendant kept his hand in his pocket during the robbery, causing the store clerk to believe he had a weapon.

SOUTHERN DISTRICT

JURY, RANDOM SELECTION

State v. Justin D. Sardeson
No. 26220, Mo.App., S.D., Aug. 17, 2005

The court reversed the defendant's conviction when the circuit clerk in charge of seating a venire pool from a list of prospective jurors inadvertently seated the jurors according to their birth dates, rather than randomly. The jury selection process was a substantial failure to comply with Chapter 494.400.

CHILD ABUSE, EXPERT TESTIMONY

State v. Clayton D. Price
No. 26318, Mo.App., S.D., June 29, 2005

In a prosecution for first-degree statutory sodomy, the court declined plain error review of a nurse's testimony about the victim's demeanor. Her "profound" impact testimony and "personal reasons" statement are isolated, ambiguous comments that were neither highlighted nor stressed by the state. The defendant failed to prove how these remarks could be interpreted as vouching for the victim's credibility.

ARMED CRIMINAL ACTION

State v. Jibril Bin-Amir Walton
No. 26038, Mo.App., S.D., June 23, 2005

The court upheld the defendant's conviction of involuntary manslaughter and armed criminal action based on that underlying felony. As held in *State v. Belton*, 153 S.W.3d 307, 310 (Mo. banc 2005), since Section 571.015 specifically provides that it is applicable to "any felony" committed with a deadly weapon, the culpable mental state of the underlying felony is irrelevant.

This conclusion is consistent with Section 562.026(2), RSMo Supp. 1999, which provides that no culpable mental state is to be imputed to an offense if imputation is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result. The culpable mental state of purposely or knowingly as imputed to armed criminal action applies only to the weapon use, not to the underlying felony.

TAMPERING WITH A WITNESS

State v. Jeremiah E. Pittman
No. 26203, Mo.App., S.D., July 13, 2005

There was sufficient evidence to convict the defendant of tampering with a witness. The state presented substantial evidence that the defendant and an accomplice threatened a witness to intimidate and thereby dissuade him from testifying against the defendant in his pending trial or against the accomplice in any future criminal proceedings.

The jury could infer that they did so to induce officer Mark Ringgold not to testify because they both had sold drugs to him; knew he could testify against them; and knew charges against a suspect could be dismissed if an informant refused to cooperate with the prosecutor.

BAIL BONDS

State v. Bobby Eugene Carroll and A-Advanced Bail Bonds
No. 26438, Mo.App., S.D., July 6, 2005

The court reversed the judgment of the trial court requiring the bond company to reimburse the state for expenses the state and Polk County incurred in returning Bobby Eugene Carroll to Missouri from Georgia.

The company argued the state did not accord it the "first opportunity," pursuant to Section 374.770.2, to return Carroll.

The record revealed that the appellant bond company had told the trial court that Carroll was incarcerated in Georgia. While the appellant knew Carroll was jailed in Georgia, it did not know whether Carroll was going to serve prison time or be extradited, or even when he was going to be released.

The trial court's finding that the appellant could have stationed its employee outside of the Georgia jail for an undetermined period of time is unreasonable because on being informed by Georgia authorities of Carroll's impending release, a phone call from the sheriff could have alerted the appellant.

DRUG PARAPHERNALIA, METH

State v. Shawn D. Daggett
No. 26157, Mo.App., S.D., Aug. 1, 2005

There was sufficient evidence of the defendant's conviction of possession of drug paraphernalia with intent to use it together to make meth. The jury could have concluded from this evidence that the propane cylinder and valve were separate items. There is no requirement in Section 195.233.2 that the combined items of paraphernalia be otherwise useful independent of each other in the manufacture of meth.

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Son dies; evidence supports endangerment conviction

State v. Lena M. Buhr
No. 64104, Mo.App., W.D., Aug. 16, 2005

There was sufficient evidence to convict the defendant of endangering the welfare of a child, and for jurors to find that the defendant was aware her conduct was practically certain to substantially risk her son's life.

A child's appearance can alert parents that their child is being abused or needs medical attention — *State v. Gaver*, 944 S.W.2d 273, 277 (Mo.App. S.D. 1997). The child had visible bruises, a black eye and missing clumps of hair that two witnesses noticed in the months before his death.

They testified the injuries started appearing when the child moved to an apartment near the perpetrator. The injuries put the defendant on notice her child was being abused and she should have been aware there was a substantial risk that the neighbor could injure her son at any time, and her conduct on that day was practically certain to cause that risk.

UPDATE: CASE LAW

SOUTHERN DISTRICT

POSSESSION WITH INTENT TO DISTRIBUTE

State v. Gerald Sanderson
No. 26412, Mo.App., S.D., Aug. 11, 2005

The court affirmed the defendant's conviction of possessing, with intent to distribute, more than 5 grams of marijuana.

The evidence was sufficient for the jury to find that the defendant constructively possessed the 10 pounds of marijuana found in the trunk of the car in which he was a passenger.

Given the amount of marijuana found and the defendant's access, there was sufficient additional incriminating circumstances to support his knowledge of the substance that would be used for trafficking.

RESISTING ARREST

State v. Ramona A. Miller
No. 26164, Mo.App., S.D., Aug. 10, 2005

The court affirmed the defendant's conviction of resisting arrest during a traffic stop where she refused officers' request to exit her vehicle, and grasped the steering wheel when they tried to remove her. The jury could have reasonably concluded that the defendant used physical force in resisting arrest by exerting the strength and power of her muscles to overcome attempts to pull her from the car.

METH/JOINT POSSESSION

State v. Clarence J. Glowczewski
No. 26331, Mo.App., S.D., July 29, 2005

There was sufficient evidence of the defendant's joint possession of meth.

The state presented sufficient evidence of additional incriminating circumstances to permit the inference that the defendant had knowledge of and control over the meth found in his trailer and in another man's pocket.

The defendant admitted owning the trailer where meth was being made. He was living alone and had routine access to the trailer, which also contained his clothing and belongings.

On entering the trailer, deputies saw a meth lab set up in plain view. The drug residue and paraphernalia recovered tested positive for meth.

The defendant exhibited consciousness of guilt by denying that he owned the trailer.

The jury could also infer that the defendant would not have known where to find the "finished product" unless he had been inside the trailer and knew meth was being produced there.